FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

Nancy Pelosi for Congress and Paul Pelosi	)	
in his official capacity as treasurer	)	MUR 6020
Representative Nancy Pelosi	)	
The Alliance for Climate Protection	)	

STATEMENT OF REASONS
Vice Chairman MATTHEW S. PETERSEN and
Commissioners CAROLINE C. HUNTER and DONALD F. McGAHN

I. INTRODUCTION

As explained in our joint Statement of Reasons with Chairman Steven T. Walther and Commissioner Cynthia L. Bauerly, this matter involved alleged violations stemming from television and newspaper ads featuring U.S. House of Representatives Speaker Nancy Pelosi that the Alliance for Climate Protection (the "Alliance") created, produced, and financed. On May 5, 2009, we rejected the Office of General Counsel's ("OGC") recommendation that (1) we find reason to believe the Respondents violated 2 U.S.C. § 441b(a) by making and accepting a prohibited in-kind corporate contribution resulting from coordinated communications, and (2) that Nancy Pelosi for Congress, and Paul Pelosi in his official capacity as treasurer, violated 2 U.S.C. § 434(b) by failing to report an in-kind contribution resulting from coordinated communications.

For the reasons set forth in our joint Statement of Reasons, we joined with our colleagues in voting to dismiss this matter in an exercise of our prosecutorial discretion.[1] However, without prejudging the Commission's revisions to the coordinated communications regulations pursuant to the *Shays III* ruling,[2] we write separately to explain why we may recommend that the Commission propose and seek public comment on a safe harbor addressing the types of activities at issue in this matter. Furthermore, any violation in this matter was, at most, technical in nature.

[1] *See Heckler v. Chaney*, 470 U.S. 821, 831 (1995).
[2] *See infra* note 8.

II. DISCUSSION

The Federal Election Campaign Act of 1971, as amended (the "Act"), subjects contributions and expenditures to certain restrictions, limitations, and reporting requirements.[3] A contribution is defined, in relevant part, as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office*."[4] An expenditure is defined, in relevant part, as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person *for the purpose of influencing any election for Federal office*."[5]

The response from Speaker Pelosi and Nancy Pelosi for Congress states:

> The facts show that the Alliance's ad had no purpose of influencing any election. It was sponsored by a charity prohibited from partisan political intervention. It was distributed nationally without targeting the Speaker's district. It placed her next to a famous Republican who was anathema to her Democratic primary voters, and who continues publicly to criticize their supposed views. It was distributed before an election that she won with nearly ninety percent of the vote, as part of an ongoing, nationwide campaign.[6]

Assuming *arguendo* that the ads in question had some purpose of influencing an election, they may constitute in-kind contributions, which include an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents," and are subject to the same restrictions and reporting requirements as other contributions.[7] The Commission's regulations at 11 C.F.R. 109.21 provide that coordinated communications constitute in-kind contributions from the party paying for such communications to the candidate, candidate's authorized committee, or political party committee which coordinates the communication.[8]

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[3] *See generally* 2 U.S.C. §§ 441a, 434b.
[4] 2 U.S.C. § 431a(8)(A) (emphasis added).
[5] 2 U.S.C. § 431a(9)(A) (emphasis added).
[6] MUR 6020, Response of Nancy Pelosi, Nancy Pelosi for Congress, and Paul Pelosi, Treasurer at 2.
[7] 2 U.S.C. § 441a(a)(7)(A), (B)(i); 11 C.F.R. 100.52(d)(1), 109.21(b).
[8] In *Shays v. F.E.C.* ("*Shays III*"), the U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays III*, No. 07-5360, 2008 WL 2388661 (D.C. Cir. June 13, 2008).

As discussed below, these ads fell just short of the coordinated communications safe harbor for charitable solicitations. Without prejudging the rulemaking, we may recommend that the Commission, in its Notice of Proposed Rulemaking ("NPRM") for *Shays III*,[9] propose and seek public comment on expanding that provision to permit the types of advertisements at issue in this matter.

A. The Conduct Prong

In this matter, Respondents arguably satisfied the conduct prong under either the "assent to suggestion" or the "material involvement" standards.

First, the conduct prong is satisfied if a candidate or candidate's committee assents to a suggestion that the public communication be created, produced, or distributed, and that suggestion came from the person paying for the communication.[10] The Commission has explained that "this second way of satisfying the conduct standard is intended to prevent circumvention of the statutory 'request or suggestion' test (2 U.S.C. § 441a(a)(7)(B)(i), (ii)) by, for example, the expedient of implicit understandings without a formal request or suggestion."[11] In other words, 11 C.F.R. 109.21(d)(1)(ii) is intended to prevent circumvention of 11 C.F.R. 109.21(d)(1)(i) (*i.e.*, the first way of satisfying the conduct standard), which governs cases in which *the candidate or candidate's committee* requests or suggests *to the person paying for the communication* that the public communication be created, produced, or distributed.

Here, the Alliance's *sua sponte* submission states that Al Gore, in his capacity as Chairman of the Alliance, "telephone[d] Speaker Pelosi and [former] Speaker Gingrich to invite them to participate in the We Campaign advertisement," and Speaker Pelosi "agreed to appear in [her] official capacit[y]."[12] The Alliance also produced an email dated February 27, 2008 from a Martin Agency representative Gordon to Drew Hammill, the contact for Speaker Pelosi, confirming that Speaker Pelosi "agreed to participate in [the advertisements] via her conversation with Al Gore earlier this month." In their joint response, Speaker Pelosi and the Committee state "she agreed to appear . . . in a national television advertisement sponsored by the Alliance . . . ."[13]

As these facts indicate, there was no evidence that Speaker Pelosi or her campaign committee ever requested or suggested the ad to the Alliance, or that there was any implicit, covert understanding that the Alliance would create, produce, and distribute the ad to benefit Speaker Pelosi's candidacy, or that there was any effort by Speaker Pelosi or

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[9] *See supra* note 8.
[10] 11 C.F.R. 109.21(d)(1)(ii).
[11] Explanation and Justification for Coordinated and Independent Expenditures ("E&J"), 68 Fed. Reg. 421, 432 (Jan. 3, 2003).
[12] Pre-MUR 472 / MUR 6191, *Sua sponte submission* of the Alliance for Climate Protection at 3, 4.
[13] *Id.* at 2.

the Alliance to circumvent 11 C.F.R. 109.21(d)(1)(i) with a "wink or nod."[14] Rather, the Alliance and its media agency proposed the ad because they believed Speaker Pelosi, by virtue of who she was and her contrast to former Speaker Gingrich, would benefit the Alliance's message. Nonetheless, on the face of 11 C.F.R. 109.21(d)(1)(ii), Respondents arguably met this conduct standard, even though the provision was really meant to prevent circumvention of the rule governing situations in which a candidate requests or suggests that an outside group run an ad for the candidate's own political benefit – a situation not present here.

Alternatively, the conduct prong also may be satisfied if Speaker Pelosi was materially involved in decisions regarding the content, intended audience, means or mode, or the size, prominence, or duration of the advertisement.[15] The Commission has not foreclosed altogether the possibility that a candidate could appear in an ad without being materially involved.[16] The Commission also has stated that the material involvement factor is meant to "protect against overbreadth" and to "safeguard against the

[14] *McConnell v. FEC*, 540 U.S. 93, 221-22 (2003) ("[E]xpenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.' For that reason, Congress has always treated expenditures made 'at the request or suggestion of' a candidate as coordinated.") (internal citations omitted).

[15] 11 C.F.R. 109.21(d)(2).

[16] In prior advisory opinions which OGC cited in this matter, the Commission has suggested that a candidate's appearance in an advertisement may constitute material involvement. Without judging whether these opinions were decided properly, we note first that it is improper for the Commission to use advisory opinions as swords instead of as shields. Under the Act, advisory opinions may not promulgate "any rule of law" that then becomes the basis of an enforcement action. 2 U.S.C. § 437f(b). The purpose of advisory opinions is to *protect* any party involved in a specific transaction or activity that is indistinguishable in all material aspects from the subject of the advisory opinon from being subject to any sanction. 2 U.S.C. § 437f(c). Additionally, the prior advisory opinions arguably are distinguishable from the facts in this matter. In Advisory Opinion 2003-25 (Weinzapfel), the Commission suggested that a federal candidate's appearance in an advertisement endorsing a state candidate could constitute material involvement, where the candidate reviewed the script "for appropriateness," but did not conclude that a candidate's mere appearance in an advertisement constitutes material involvement *per se*. Moreover, the Commission's statement in Weinzapfel was *dicta*, because the ad at issue otherwise would not have been a coordinated communication anyway, due to the content prong not being met. In Advisory Opinion 2004-1 (Forgy Kerr), the Commission again suggested that an appearance by a federal candidate (in this case the president) in an advertisement endorsing a state candidate could constitute material involvement where the president's agents extensively reviewed the ad script for "consistency with the President's position and any content that distracts from or distorts the 'endorsement' message that the President wishes to convey." In contrast to those AOs, which indicated some not insignificant level of review by the federal candidate of the ad scripts, here, the Alliance's response indicated that Speaker Pelosi's congressional leadership office staff reviewed generally "the content of the script," while Speaker Pelosi's response contended that she "delivered a script conceived by the Alliance for its own purposes." MUR 6020, Response of the Alliance for Climate Protection at 6; Response of Nancy Pelosi, Nancy Pelosi for Congress, and Paul Pelosi, Treasurer at 3. Thus, even assuming *arguendo* that a candidate's review of an ad script in which she appears may determine whether the conduct prong is met, in this case, it does not appear that the review by Speaker Pelosi's congressional leadership staff was as extensive as that at issue in AOs 2004-1 and 2004-29. We note these differences not to suggest that any of them are material in determining whether the coordinated communication conduct prong is met by a candidate's mere appearance in an ad, but rather to note the factual distinctions in this matter, assuming *arguendo* that those advisory opinions have any affirmative force of law or bearing whatsoever here.

inclusion of incidental participation that is not important to, or does not influence, decisions regarding a communication," and that material involvement must be determined "on a case-by-case basis."[17]

The *sua sponte* submission reflects that Speaker Pelosi and her leadership office staff were shown and made changes to the scripts between March 24 and April 2, 2008, and the Alliance admits that communications with her leadership office staff included discussions concerning "the content of the script."[18] Based on the record available to us, at no time did any Alliance agents communicate with anyone on Speaker Pelosi's campaign staff, and there is no suggestion or evidence that they had any involvement whatsoever in the ads' intended audience, means or mode of transmission, or their size, prominence, or duration.[19]

Again, on the face of 11 C.F.R. 109.21(d)(2), Speaker Pelosi's appearance in the ads and her staff's input into their content may have been extensive enough to constitute "material involvement" for the purposes of the conduct prong. However, to mechanically apply the material involvement factor on these facts could constitute the type of overbreadth the Commission cautioned against in the E&J, and ignores its admonition to apply the rule on a "case-by-case basis." Additionally, Speaker Pelosi's congressional leadership office staffers presumably were not acting on behalf of her campaign committee in their communications with the Alliance.[20]

B. Safe Harbor For Charitable Solicitations

The Commission's regulations provide a safe harbor for charitable solicitations that otherwise might constitute coordinated communications:

> A public communication in which a candidate for Federal office solicits funds for another candidate for Federal or non-Federal office, a political committee, or organizations as permitted by 11 CFR 300.65, is not a coordinated communication with respect to the soliciting Federal candidate unless the public communication promotes, supports, attacks, or opposes the soliciting candidate or another candidate who seeks election to the same office as the soliciting candidate.[21]

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[17] E&J at 433.
[18] Pre-MUR 472 / MUR 6191, *Sua sponte submission* of the Alliance for Climate Protection at 6-7.
[19] *Id.*
[20] *See* "House Ethics Manual," Committee on Standards of Official Conduct, 110th Cong., 2008 ed. at 123 ("[O]fficial resources of the House must, as a general rule, be used for the performance of official business of the House, and hence those resources may not be used for campaign or political purposes . . . Accordingly, among the resources that generally may not be used for campaign or political purposes are . . . congressional staff time.").
[21] 11 C.F.R. 109.21(g)(2).

11 C.F.R. 300.65 permits solicitations by Federal candidates and officeholders for tax-exempt organizations described in 26 U.S.C. § 501(c).

Although the Commission has not defined what it means to "promote, support, attack, or oppose" ("PASO"), neither the complaint, nor the *sua sponte* submission, nor OGC alleged that the Alliance ads PASO Speaker Pelosi or her opponents for her House seat. Accordingly, because the Alliance is a 501(c)(3) organization, had Speaker Pelosi merely added an explicit solicitation for donations to the Alliance at the end of the ads in question, the safe harbor would apply.

We find it somewhat incongruous that ads, such as the ones in question, which clearly focus on a public policy issue and promote support for a non-profit organization, would constitute prohibited coordinated communications with a Federal candidate, whereas the same exact ads would fall under the safe harbor if the Federal candidate had merely taken the additional step of asking for money for the organization.

The ads' primary purpose was to focus public attention on a policy issue. Accordingly, without prejudging the rulemaking, we may recommend that the Commission propose and seek public comment on revising the safe harbor in the *Shays III* rulemaking to include *bona fide* public service announcements such as the ones at issue here.

III. CONCLUSION

Without prejudging the rulemaking, in the Commission's revised rulemaking on coordinated communications, we may recommend that it propose and seek comment on expanding the safe harbor to permit activities such as those at issue in this matter.[22] Pending that rulemaking, the Respondents' activity was, at most, a technical violation,[23] and we determined that pursuit of this matter would not be a prudent use of Commission resources. For these reasons, we voted to dismiss this matter pursuant to *Heckler v. Chaney*.[24]

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[22] *See, e.g.*, MUR 5718, in which OGC recommended, and the Commission voted unanimously to approve, dismissing as a matter of prosecutorial discretion allegations that Rep. Jesse L. Jackson, Jr. violated the coordinated communications regulations for activity that, although not protected under the regulations at the time, subsequently was protected by the safe harbor at 11 C.F.R. 109.21(g). MUR 5718, First General Counsel's Report at 7 and Certification, Nov. 28, 2006.

[23] *See* MUR 5595, Statement of Reasons of Chairman Michael E. Toner, Vice Chairman Robert D. Lenhard, and Commissioners David M. Mason, Hans A. von Spakovsky, Steven T. Walther, and Ellen L. Weintraub (dismissing as a matter of prosecutorial discretion a "technical violation" of the Act's electioneering communications and disclaimer requirements for a gun show ad referring to the "carry/Kerry permit," where the "primary purpose and effect of the advertisement was to encourage attendance at an upcoming gun show in Indianapolis").

[24] Accordingly, we need not consider whether the communications at issue constituted an impermissible corporate in-kind contribution made by the Alliance, and whether Speaker Pelosi, Pelosi for Congress, and Paul Pelosi in his official capacity as treasurer accepted and failed to report such contribution.

6/11/2009
Date

Matthew S. Petersen
Vice Chairman

6/11/09
Date

Caroline C. Hunter
Commissioner

6/11/09
Date

Donald F. McGahn II
Commissioner